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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-22

Filed: 15 August 2017

Mecklenburg County, Nos. 15 CRS 214092-95, 214097-99

STATE OF NORTH CAROLINA

v.

ANTHONY LAMONT BOULWARE

Appeal by defendant from judgments entered 10 June 2016 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Kimberly P. Hoppin for defendant-appellant.

TYSON, Judge.

Anthony Lamont Boulware (“Defendant”) appeals from judgments entered after a jury convicted him of misdemeanor false imprisonment of Ms. Boulware, assault with a deadly weapon inflicting serious injury on Mr. Harrison, and misdemeanor breaking or entering. We find no error.

I. Factual Background

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Defendant was tried on indictments charging him with three offenses committed against Diane Boulware: assault inflicting serious bodily injury, communicating threats, and first-degree kidnapping. Defendant was also tried on indictments charging him with four offenses committed against Antonio Harrison: assault with a deadly weapon with intent to kill inflicting serious injury, communicating threats, robbery with a dangerous weapon, and felonious breaking or entering.

The jury found Defendant guilty of three lesser-included offenses: misdemeanor false imprisonment of Ms. Boulware, assault with a deadly weapon inflicting serious injury on Mr. Harrison, and misdemeanor breaking or entering; but returned not guilty verdicts for Defendant on the remaining charges.

The trial court sentenced Defendant to an active term in the aggravated range of 52 to 75 months imprisonment for assault with a deadly weapon inflicting serious injury and two suspended terms of 120 days imprisonment for his misdemeanor convictions. The court ordered Defendant be placed on supervised probation for 60 months for each of his suspended sentences. Defendant filed timely notice of appeal from the judgments entered.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444 (2015).

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III. Issue

Defendant's sole argument on appeal is that the trial court erred by denying his request to instruct the jury on assault inflicting serious injury as a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury.

IV. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). When a defendant requests an instruction on a lesser-included offense, the trial court must give the instruction "only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

V. Analysis

Assault inflicting serious injury is a lesser-included offense of felonious "assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury." *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002). However, a trial court need not instruct the jury on the lesser included offense of assault inflicting serious injury where there is uncontradicted evidence that the assault was perpetrated by the use of a deadly weapon. *See Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772 ("Where the State's evidence is positive as to each element of the offense charged and there is no contradictory

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evidence relating to any element, no instruction on a lesser included offense is required.” (citation and quotation marks omitted)).

A deadly weapon is any instrument which is likely to produce death or great bodily harm, under the circumstances of its use The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. . . .

. . . .

If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict.

State v. Palmer, 293 N.C. 633, 642-43, 239 S.E.2d 406, 412-13 (1977) (citations and quotation marks omitted).

Where un-contradicted evidence tends to show an assault was perpetrated by the use of a deadly weapon, the trial court must instruct the jury that the weapon used was a deadly weapon as a matter of law. *See State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (“Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring.”). “[W]here the trial judge has left to the jury the question of the dangerous or deadly character of a weapon of ‘such character as

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to admit of but one conclusion,' our appellate courts have often found harmless error." *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 470, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

Here, the evidence at trial established that on 20 April 2015, Defendant entered Mr. Harrison's hotel room without permission and charged at Mr. Harrison with a tire iron. Defendant repeatedly struck Mr. Harrison in the head with the tire iron, knocking him to his knees, and Mr. Harrison attempted to ward off the blows using his hands.

After Defendant left the room, Mr. Harrison was transported by ambulance, to a hospital where he remained as an inpatient for two days. Mr. Harrison's skull was fractured, his nose was ripped open, the back of his right ear was cut, and he had a gash on his forehead. All of Mr. Harrison's head wounds required stitches or staples to repair and visible scars remained at the time of the trial, over a year after the assault.

No contradictory evidence suggested Defendant carried out the assault without using the tire iron. Defendant's use of the tire iron to repeatedly strike Mr. Harrison in the head, causing numerous serious injuries, is of such character as to admit of but one conclusion, that the tire iron was a deadly weapon. *See Torain*, 316 N.C. at 119, 340 S.E.2d at 470. Because we determine the tire iron used by Defendant to assault Mr. Harrison was a deadly weapon based upon the un-contradicted evidence, the

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court properly refused to instruct the jury on the lesser included offense of assault inflicting serious injury. Any error by the trial court to submit to the jury the question of whether the tire iron was a deadly weapon was harmless. *See State v. Daniels*, 38 N.C. App. 382, 383, 247 S.E. 2d 770, 771 (1978) (“If the weapon used . . . by the defendant was a deadly weapon *per se* the trial court was not required to charge on the lesser included offense of simple assault, even though the trial court did not charge that the instrument used in the assault was a deadly weapon [*per se*].”).

VI. Conclusion

The trial court did not err in instructing the jury. Defendant received a fair trial, free from prejudicial error. We find no error in the jury’s conviction or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).